



DEPARTMENT OF THE ARMY
ALASKA DISTRICT, U.S. ARMY CORPS OF ENGINEERS
REGULATORY DIVISION
P.O. BOX 6898
JBER, AK 99506-0898

CEPOA-RD-SA
POA-2010-132-Noncompliance

MEMORANDUM FOR THE RECORD

SUBJECT: Public Interest Determination iaw 332.8(n)(4) and subsequent required actions.

Background:

August 24, 2015, District provided written response to sponsor's questions regarding funds collected after the effective date of The Conservation Fund's In Lieu Fee Instrument dated June 7, 2013. Sponsor refers to these as "grey zone funds".

December 7, 2016, the sponsor submits letter again requesting clarification for "grey zone funds".

January 27, 2017, District responds via letter as did in August 24, 2015, "grey zone funds" are subject to the terms of the sponsor's 2013 Instrument and the 2008 Mitigation Rule.

February 1, 2017, the District notifies (via letter) the sponsor of credit deficiency (default).

February 22, 2017, the District holds meeting with sponsor to discuss whether the sponsor wishes to proceed down corrective path District has identified or proceed to program closure.

March 3, 2017, the District requests (via letter) that the sponsor respond to questions raised in February 22, 2017 meeting. The District requests a response within 60 days.

March 9, 2017, the District meets with sponsor to discuss defaults and path forward.

March 17, 2017, the sponsor submits information to sway Corps view of "grey zone funds".

March 31, 2017, the sponsor submits letter disputing default.

April 27, 2017, the sponsor submits letter asking for clarification regarding "grey zone funds".

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May 3, 2017, the sponsor submits letter stating they are willing to proceed with modification, no statement specific to the District's suggested path forward.

May 8, 2017, the District responds to April 27 letter and March 17 submittal. District identifies that the question has been asked and answered in writing on three previous occasions: August 24, 2015, January 27, 2017, and March 3, 2017.

May 19, 2017, the District suspends the sale of advanced credits via letter iaw 33CFR332.8(n)(5) and (o)(10).

July 15, 2017, the Districts requests via letter that the sponsor submit a proposal to correct defaults and program issues to prevent future defaults. The District states intent to inform the District's public interest determination. The District allows a 60 day response time for the sponsor to provide proposal.

September 7, 2017, the sponsor submits proposal to inform Corps public interest determination.

September 26, 2017, having reviewed the sponsor's proposal, the Regulatory Division recommends that it is not in the public interest to allow additional time for the sponsor to plan and implement in lieu fee projects to correct existing defaults.

The sponsor's program is a preservation only program now in default in all four operating service areas (Arctic, Interior, Southwest, and Southcentral).

Irretrievable loss of wetland function has occurred due to the sponsor's failure to implement compensatory mitigation projects for the liabilities they assumed. Additional time will not remedy this functional loss.

Multiple defaults have exceeded or will have exceeded (by October 6, 2017) the fourth full growing season. The sponsor is projecting an additional two full growing seasons to remedy defaults.

The sponsor has identified multiple sites that are sold out (all available credits have been expended) to remedy defaults (AR-1 and AR-4). Closed sites cannot produce retroactive credits.

The sponsor has identified two sites previously denied by the District due to failure to meet performance criteria in Rule to remedy defaults (AR-7 and AR-8).

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The sponsor has disputed that twelve specific sales were not advance credit sales and has segregated these sites from service areas within their submittal. The District has informed the sponsor in writing and verbally over three years that all transactions after June 7, 2013 are ruled by their 2013 Instrument and the 2008 Mitigation Rule including the sponsor's self-identified "grey zone funds". The sponsor's 2013 (amended 2016) Instrument allows for the sale of acres or credits. Under the 2008 Mitigation Rule and the sponsor's Instrument, the only authorized action for those transactions was the sale of advance credits.

IAW 33CFR332.8(n)(4) If the district engineer determines that there is a compensatory mitigation deficit in a specific service area by the third growing season after the first advance credit in that service area is sold, and determines that it would not be in the public interest to allow the sponsor additional time to plan and implement an in-lieu fee project, the district engineer must direct the sponsor to disburse funds from the in-lieu fee program account to provide alternative compensatory mitigation to fulfill those compensation obligations.

Recommended Course of Action:

Notify the sponsor:

That the District Engineer has determined that it is NOT in the public interest to allow the sponsor additional time to plan and implement in-lieu fee projects currently in default;

That the District Engineer is exercising his authority to terminate the sponsor's In-Lieu Fee Instrument iaw 332.8(o)(10) and the sponsor's 2013 (amended 2016 Instrument); that the District Engineer will direct the sponsor to disburse funds from the in-lieu fee program account to provide alternative compensatory mitigation to fulfill all default obligations; and

That the sponsor retains responsibility for fulfilling credit obligations not currently in default. Failure to fulfill these credit obligations by the end of the third full growing season will result in the District Engineer directing disbursement of the funds collected for those credit obligations as well.

Direct the sponsor:

To submit all financial records including bank statements for the entire history of the 2013 Instrument to the District Engineer within 30 days of the date of notification.

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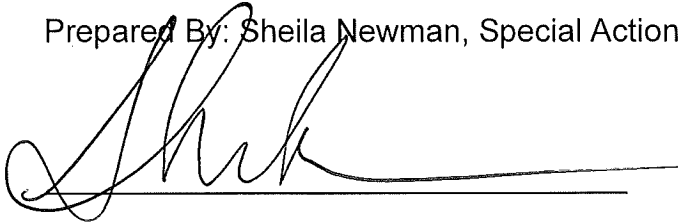
Subsequent Action:

Contract with financial expert to review all bank information and in lieu fee transactions from June 7, 2013 forward and/or seek additional information from the sponsor to finalize amount of funds available for disbursement.

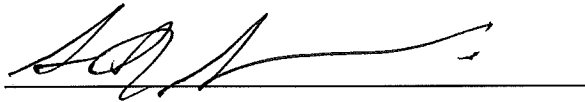
Identify potential recipients of funding by service area.

If sponsor is uncooperative with financial records, continues to dispute "grey zone funds" or existing defaults, and/or it is discovered that the sponsor has spent program funds without authorization proceed with enforcement action for failure to provide compensatory mitigation on multiple DA permits.

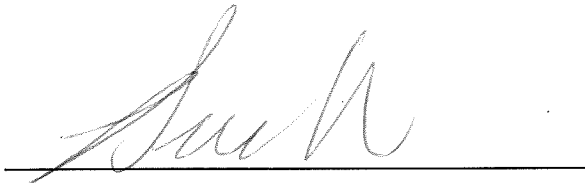
Prepared By: Sheila Newman, Special Actions Branch Chief

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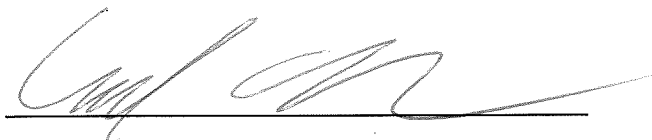
Reviewed By: Steve Sullivan, Deputy Regulatory Division

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Approved By: David Hobbie, Regional Regulatory Chief

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Concurred By: Carl Olsen, District Counsel

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